

Below is the Order of the Court.



A handwritten signature in black ink, reading "Brian D. Lynch".

Brian D. Lynch
U.S. Bankruptcy Judge
(Dated as of Entered on Docket date above)

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

In re:

FRASER'S BOILER SERVICE, INC.

Debtor.

Case No. 18-41245

**MEMORANDUM DECISION ON
SUBSTANTIAL CONSUMMATION
PROVISION IN DEBTOR'S PLAN OF
REORGANIZATION**

In its First and Second Amended Plans of Reorganization, Debtor Fraser's Boiler Service, Inc. included a provision that states "On the Effective Date, the Plan shall be deemed to be substantially consummated under Sections 1101 and 1127(b) of the Bankruptcy Code." ECF No. 442 at 39; ECF No. 125 at 26. The First and Second Amended Plans defined "Effective Date" as:

a Business Day specified by the Debtors on or after the Confirmation Date, on which (i) no stay of the Confirmation Order is in effect and (ii) the conditions to the effectiveness of the Plan specified in Article 10 of the Plan have been satisfied or waived and (iii) which is no later than ninety (90) days after the Confirmation Date, provided that no stay of the Confirmation Order is in effect.

ECF No. 442 at 5; ECF No. 125 at 4. As discussed below, substantial consummation is a term defined in the Bankruptcy Code. See 11 U.S.C. § 1101(2).

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1 Certain London Market Insurers and National Union Fire Insurance Company of
2 Pittsburgh, PA (collectively, the “Opposing Insurers”) objected to the substantial
3 consummation provision, alleging the provision violates Sections 1101 and 1129(a)(1) of the
4 Bankruptcy Code “because it attempts to specify a different date for when ‘substantial
5 consummation’ will occur.” ECF No. 381 at 22-23. The United States Trustee (“UST”) similarly
6 objected that substantial consummation was not properly defined in the Plan because it was
7 inconsistent with Bankruptcy Code Section 1101. See ECF No. 383 at 8-9.

8 Both the UST and the Opposing Insurers filed supplemental briefs in support of their
9 confirmation objections. See ECF No. 467; ECF No. 468. The UST indicated in its
10 supplemental brief that it anticipated the Debtor would resolve the UST’s substantial
11 consummation objection in a further amended plan. See ECF No. 467 at 2. The Opposing
12 Insurers reiterated their substantial consummation objection in their supplemental brief. See
13 ECF No. 468 at 7-9.

14 The substantial consummation objections were heard by the Court on October 22,
15 2018. At the October 22 Hearing, the UST indicated that the Debtor had proposed language
16 that would resolve its objection. The Opposing Insurers asserted that they had not seen the
17 proposed language, which the Debtor disputed. The substantial consummation objections
18 were continued to November 7, 2018 to give the Debtor time to file a further amended plan
19 with the proposed language and to give the Opposing Insurers time to review that language.

20 The Debtor filed its Third Amended Plan of Reorganization on November 1, 2018. See
21 ECF No. 507. In the Third Amended Plan, the Debtor amended both the substantial
22 consummation provision and the definition of “Effective Date.” The substantial consummation
23 provision now states:

24 On the Effective Date, the Liquidating Trust will be formed and all
25 Equity Interests in Fraser’s Boiler Service, Inc. will be transferred
by existing owners to the Liquidating Trust. The Plan shall be

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1 deemed to be substantially consummated under Sections 1101
2 and 1127(b) of the Bankruptcy Code once the Effective Date has
3 occurred and distributions have been paid to one or more Class 1,
4 Class 2, or Class 3 Creditors.

5 *Id.* at 38. “Effective Date” is now defined as:

6 a Business Day specified by the Debtors on or after the
7 Confirmation Date, on which (i) no stay of the Confirmation Order
8 is in effect and (ii) the conditions to the effectiveness of the Plan
9 specified in Article 10 of the Plan have been satisfied or waived
10 and (iii) one or more of the approval orders related to settlement
11 agreements with the Settling Insurers has become a Final Order or
12 one or more of the Settled Insurers has waived the requirement of
13 a Final Order approving such a settlement and no stay of the order
14 approving such settlement is in effect. The Effective Date will be
15 no later than ninety (90) days after the first day on which the
16 conditions of the preceding sentence have been satisfied.

17 *Id.* at 5.

18 The Court resumed the hearing on the substantial consummation objections on
19 November 7, 2018. At that hearing, the UST informed the Court that its objection to the
20 substantial consummation provision was resolved. The Opposing Insurers’ objection,
21 however, was not resolved. The Court heard argument from the Opposing Insurers and the
22 Debtor on the substantial consummation provision and took the matter under advisement.

23 Substantial consummation is defined under Section 1101 of the Bankruptcy Code:

24 “substantial consummation” means—

25 (A) transfer of all or substantially all of the property proposed by
the plan to be transferred;

(B) assumption by the debtor or by the successor to the debtor
under the plan of the business or of the management of all or
substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

11 U.S.C. § 1101(2). “Whether a plan has been substantially consummated is a question of
fact to be determined upon the circumstances of each case.” *In re Nacio Sys., Inc.*, No. 02-

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1 10596, 2003 WL 22945642, at *2 (Bankr. N.D. Cal. May 9, 2003) (citing *In re Jorgensen*, 66
2 B.R. 104, 106 (B.A.P. 9th Cir. 1986)).

3 When asked by the Court what the value was, from the Debtor's perspective, of a more
4 carefully crafted substantial consummation provision, Debtor's counsel responded "the more
5 black and white identified facts that result in substantial [consummation] would allow us to
6 conclude this case and close it out without ambiguity." ECF No. 535 at 38 (Transcript of
7 November 7 Hearing). While the Court understands the Debtor's concerns in light of the
8 contentious nature of this case, the Bankruptcy Code's definition of substantial consummation
9 is sufficient by itself. Whether the Plan has been substantially consummated is a fact question
10 to be decided when the issue arises, and Section 1101(2) will guide that evaluation. The
11 presence of a substantial consummation provision in the Plan is unnecessary and risks
12 confirmation of a substantial consummation standard that is inconsistent with the Bankruptcy
13 Code. Accordingly, the Court will not confirm the Debtor's Plan if it contains the substantial
14 consummation provision located under Paragraph 12.8.

15 Therefore, the Opposing Insurers' substantial consummation objection is SUSTAINED.

16 /// END OF ORDER ///